Division Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

CRIMINAL APPEAL NO. 710 /2005

APPELLANT	Amar Sai S/o Jangal Sai
IN JAIL	aged about 59 years,
	R/o Sedam P.S. Batouli ,
	District--Sarguja (C.G.)
	VERSUS
RESPONDENT	The State of Chhattisgarh
	Through-. Batouli,
	District--Sarguja (C.G.)

S.T. No. - 47/93
Offence U/s – 302 of I.P.C.
Court of II A.S.J., Ambicapur, C.G.

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर (18)

आदेश पत्रक

मामला क्रमांक Cr. A. 710 सन् 2005

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

3-1-2006

Mrs. Kiran Jain, counsel for the appellant.

Mr. G.K. Beriwal, Deputy Advocate General with Mr. Alok Bakshi, Govt. Advocate for the State/respondent.

Oral judgment.

Criminal Appeal No.1626/1994 filed by accused Amar Sai pertaining to the murder of Balmukund arising out of the Sessions Trial No.49/93, Criminal Appeal No.710/2005 filed by the same accused pertaining to the murder of Ratan arising out of the Sessions Trial No.47/93 and Criminal Appeal No.729/2005 filed by the same accused pertaining to the murder of Phulbaso Bai arising out of the Sessions Trial No.48/93 are being disposed of by this common judgment, as the evidence in all these three cases is similar and all the three murders of Balmukund, Phulbaso Bai & Ratan were committed at the same time, at one place, at the residence of deceased Balmukund, alleged to have been committed by accused/appellant Amar Sai.

By these appeals, accused/appellant Amar Sai has questioned the legality of the judgment of conviction and order of sentence dated 24-9-1994 passed in Sessions Trial No.49/93 pertaining to the murder of Balmukund, also the judgment of conviction and order of sentence dated 29-9-1994 passed in Sessions Trial No.47/93 pertaining to the murder of Ratan, and the judgment of conviction and order of sentence dated 28-9-1994 passed in Sessions Trial No.48/93 pertaining to the murder of Phulbaso Bai by the 2nd Additional Sessions Judge, Ambikapur, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for the commission of

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आदेश का नांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित — 2 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

offence under Section 302 of the I.P.C. sentenced him to undergo imprisonment for life in each of the sessions trial.

The case of the prosecution, in brief, is that on 20th January, 1992, Sudhu Das gave a merg intimation in Police Station: Batauli that on that day on the information given by Kotwar Bokharam to the effect that one person is lying dead in the courtyard of Balmukund, he went to the house of Balmukund and saw that the dead body of Ratan Korwa was lying in the courtyard, he went upstairs of the house and saw the bodies of Phulbaso Bai & Balmukund, there were injuries on the parietal region, eye brows & face, and the injuries appear to be caused by a sharp edged weapon.

The Station House Officer recorded the merg intimation Ex.P-1. He took up the investigation and left for the scene of occurrence, where he prepared the Panchnama of the dead body of Balmukund Ex.P-2, the Panchnama of the dead body of Ratan Ex.P-2, and the Panchnama of the dead body of Phulbaso Bai Ex.P-2, after giving notice to the Panchas. He also took into possession one quilt stained with blood, plain soil and blood stained soil from all the places of occurrence. Requisitions were sent to the Primary Health Centre, Batauli for conducting post-mortem on the bodies of Balmukund, Phulbaso Bai & Ratan. Dr. Vijay Kumar Mishra (PW-6) conducted post-mortem on the bodies of Balmukund, Phulbaso Bai & Ratan and prepared the post-mortem report of all the three bodies. The site plan of the place of occurrence was also prepared. During the course of investigation, accused Amar Sai, while in the Police custody, gave information regarding the place where he concealed the axe, the weapon of offence, and in pursuance of that, accused Amar Sai got recovered the axe. The blood stained articles were sent to the Forensic Science Laboratory, Sagar for examination, from where the report was received in which the axe,

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Dhoti, Banian, quilt and blood stained soil were found to be stained with blood.

After completion of investigation, separate charge sheets in connection with each murder were filed in the Court of Judicial Magistrate, 1st Class, Ambikapur, who in turn committed the case to the Sessions Judge, Ambikapur, from where, the 2nd Additional Sessions Judge, Ambikapur, received the case for trial.

The prosecution in order to establish charge against the accused examined as many as 16 witnesses in each case. Learned Additional Sessions Judge also recorded the statement of the accused under Section 313 of the Code of the Criminal Procedure, in which he either pleaded innocence or denied the prosecution evidence and further stated that the prosecution witnesses are liar, he has been implicated in a false case.

Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused, convicted and sentenced the accused in each of the sessions trials as mentioned in para 2 of this judgment.

We have heard Mrs. Kiran Jain, learned counsel on behalf of the accused/appellant in all the three appeals and Mr. G.K. Beriwal, learned Deputy Advocate General with Mr. Alok Bakshi, learned Govt. Advocate on behalf of the State/respondent.

Mrs. Kiran Jain, learned counsel for the accused/appellant did not dispute the fact of homicidal nature of the death of Balmukund, Phulbaso Bai & Ratan. Apart from that, from the evidence of Dr. V.K. Mishra (PW-6) who conducted the post-mortem on the bodies of all the three deceased persons and from the evidence of Sudhu Das, Devkaran & Bokharam it is established that the death of Balmukund, Phulbaso Bai & Ratan was homicidal in nature.

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As far as the involvement of the accused/appellant in committing these three murders is concerned, learned counsel for the accused/appellant argued that whole case rests on the circumstantial evidence i.e. three circumstances namely, (1) the deceased persons were last seen alive with the accused before their death; (2) the accused was absconding from the house of Balmukund after the commission of the crime; and (3) the weapon of offence, the axe, stained with blood was recovered at the instance of the accused. The prosecution has not been able to connect the appellant with these three murders based on these circumstances, because there is no evidence on record that any of the prosecution witnesses saw the accused accompanying the deceased persons on the way from the house of Derang to the house of Balmukund, further, there is no evidence that the prosecution witnesses saw accused Amar Sai in the house of Balmukund in the fateful night where the dead bodies were found. She also argued that in the first instance the fact of giving information and recovery of axe leading to that information is also not proved and further that there is no evidence of Serologist to the effect that the blood, which was found on the axe, the weapon of offence, was human blood.

On the other hand, Mr. G.K. Beriwal, learned Deputy Advocate General with Mr. Alok Bakshi, learned Govt. Advocate supported the judgments of the trial Court.

It is admitted position that whole case rests on the circumstantial evidence, as there is no direct and ocular evidence in all the three cases. In order to convict the accused based on the circumstantial evidence, the Apex Court in the matter of **Dhananjoy Chatterjee vs. State of W.B.** reported in **(1994) 2 SCC 220** has held that:

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"In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

Now, we shall proceed to examine the evidence adduced by the prosecution in order to establish charge against the accused. The prosecution has adduced evidence to prove the following circumstances in order to connect the accused with the three murders

a. that, the accused was last seen in the company of the deceased persons when they were alive;

b. that, the accused was absconding from the house of Balmukund after commission of the crime; and

c. that, the weapon of offence, the axe, was recovered on the information of the accused given under Section 27 of the Evidence Act.

As far as the theory of last seen is concerned, law is well settled. The Apex Court in the matter of **Bodhraj alias Bodha and others vs. State of Jammu & Kashmir** reported in **(2002) 8 SCC 45** has held that:

"the theory of last seen comes into play where the time-gap between the point of time when the accused

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and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

In the matter of **Subhash Chand vs. State of Rajasthan** reported in **(2002) 1 SCC 702**, the Apex Court has held that:

"To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime."

Again, in the matter of **State of Karnataka vs. M.V. Mahesh** reported in **(2003) 3 SCC 353**, the Apex Court has held that:

"Merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together."

Therefore, as per the above law laid down by the Apex Court, before convicting an accused based on the last seen together theory, the Court is required to ascertain from the legal clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of the deceased must be so close and proximate that an inference regarding the guilt of the accused can safely be drawn and there is no possibility of coming of any third person in between the last seen together and the death of the deceased. There must be unerringly clinching legal evidence that should point only towards the involvement of the

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accused in commission of murder. Further, it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime.

Now, based on this principle, if we scrutinize the evidence available on record, witness Derang to whose house the deceased persons and the accused along with his son went for the purpose of treatment, has clearly stated in his evidence that deceased Balmukund, his wife Phulbaso Bai, accused Amar Sai, his son and one another person namely, Khamar, came to his house and requested him to enchant the religious Bhajan. After listening to the Bhajan, accused Amar Sai, son of the accused, Balmukund, his wife Phulbaso Bai and Khamar left for their houses. Similar is the evidence of Khamar that he was with the deceased persons and the accused was at the residence of Derang. In para 6 of the cross-examination, he has stated that he along with deceased Balmukund, Anandi and elder son of Amar Sai returned to his house and Balmukund left for his house, thereafter when he was informed by the Kotwar he went to the scene of occurrence. This witness has not even stated that Amar Sai accompanied them. Witness Chanda has also stated that he went to the house of Derang, as he was not keeping well. At the house of Derang, Navratri programme was going on. Next day morning, he came to know about the fact that some murder has taken place in Tongipara. At the time of dance, at the residence of Derang, he along with Balmukund and Basant were present, accused Amar Sai also came there and the uncle of Amar Sai was saying that they have come there for taking treatment for Amar Sai. Other witness Balmukund has stated that his wife was not keeping well, therefore, he alongwith his wife went to the house of Derang where dance and song was organized, thereafter he

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returned to his house and the next day morning he came to know that Balmukund, his wife Phulbaso Bai & Ratan are murdered. Whether Amar Sai was at the residence or not, he had no information. The evidence of Bokharam is to the effect that accused Amar Sai was residing with his uncle Balmukund since last two days and the accused was absconding since morning of the date of incident in which the three persons were murdered.

While applying the above principle laid down by the Apex Court in order to convict the accused in the crime in question, if we look into the above evidence adduced by the prosecution, it is established that on the previous evening of the date of incident i.e. evening of 19th January, 1992, the accused and the deceased persons went to the house of Derang and they left the house of Derang after watching the dance and listening the Bhajan. There is no legal evidence on record to establish that the accused accompanied the deceased persons to the house of Balmukund and as per record, the distance between Derang's house and the house of Balmukund, where the dead bodies were found, is about 1 ½ kms. There is no evidence to the effect that anybody saw the accused in the company of the deceased persons on the way to the house of the deceased or in the house where the murders were committed or in the nearby vicinity in the fateful night when the incident took place.

Therefore, based on the above evidence when there is no evidence to the effect that the accused was seen with the deceased persons on the way when they were coming back to the house of Balmukund and also that the accused was seen in the house or in the nearby vicinity in the fateful night, in such a situation based on the above evidence, it is difficult to draw an inference based on the last seen theory that the accused was the author of the ghastly murders. In order to connect the accused with the murders on

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the basis of last seen theory, as has been held by the Apex Court, time between when the accused and the deceased were seen last together alive and the death must be so close and proximate that inference regarding the guilt of the accused can be drawn and there is no possibility of coming any third person in between the last seen together and the death of the deceased. We are of the considered opinion that merely because the accused was residing with Balmukund since last 2-3 days and on the fateful evening the accused was with the deceased persons at the residence of Derang which was at a distance of 1½ kms. from the place of occurrence, based only on this evidence, the accused cannot be connected with the murders without corroboration of this evidence from any clinching legal evidence which points towards the involvement of the accused in the commission of murders.

It is true that the accused was found missing from the morning of the date of incident, from the residence of Balmukund, where the crime was committed. But, merely on this ground, looking to the facts and circumstances of the case, the accused cannot be connected with the heinous crime, as there is no evidence on record that the accused came along with the deceased persons to the house of Balmukund after leaving the residence of Derang. Merely because of the absence of the accused from the place of occurrence, no inference can be drawn regarding his involvement in the crime. The accused was arrested from his house on 24-1-1992. Therefore, possibility cannot be ruled out that the accused must have left for his house after taking treatment at the hands of Derang.

In the matter of **Akhilesh Hajam vs. State of Bihar** reported in **1995 SCC (Cri) 883**, appellant Akhilesh Hajam was charged with the murder of his own mother, sister, wife & daughter, charge against him was that he after

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committing the murders absconded from his house, and the evidence was that he was not present at house and was seen going towards Village: Tumba which was only one mile away from Village: Dehlabad where the occurrence took place. The Apex Court held that from the evidence it cannot be inferred that the appellant had absconded after the occurrence as the appellant was found in the village itself from where he was taken by some one of the witnesses to the house and detained.

Similarly, in the present case, the accused was arrested from his village on 24-1-1992. If he had any intention to disappear or abscond after committing the crime, he could have easily disappeared from his village and remained absconding and he should not have remained at his house. Therefore, the ground that the accused disappeared from the house of Balmukund cannot be taken as a circumstance to connect the accused with the crime in question, because in the first instance, there is no legal evidence that Amar Sai went to the house of Balmukund from the house of Derang, there is no evidence that in the fateful night the deceased was seen in the house of Balmukund or in the vicinity of Balmukund's house, and after committing the crime in question, he absconded from the place of occurrence.

Moreover, as per the prosecution case, the accused is the real nephew of deceased Balmukund who said to have brought the accused to his house for treatment and the prosecution has not been able to show any motive behind committing the three murders by the accused. It is true that it is difficult to know the motive of an accused person, but where the case rests on circumstantial evidence, motive plays a vital role. As has been held by the Apex Court in the matter of **Suresh Chandra Bahri vs. State of Bihar** reported in **AIR 1994 SC 2420**, sometimes motive plays an important role

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and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something, which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the Court that the accused was guilty for the offence charge with. But the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime.

As far as recovery of the axe at the instance of the accused is concerned, even if it is accepted that the axe was recovered at the instance of the accused, such axes are normally found in every house in the village side. In order to connect the accused with the crime, based on the recovery of the axe, it was necessary that the prosecution ought to have got the axe examined by the Serologist and the Serologist's report must have been filed and proved that the axe which was recovered at the instance of the accused was stained with human blood, that too the blood was of the blood group of the deceased persons. Only the report of the Forensic Science Laboratory has been filed in which the Laboratory has given the opinion that the axe was stained with blood, whether it was human blood or other blood it has not been mentioned. Therefore, without the Serologist's report to the effect that the blood, which was found on the axe, was of the same blood group of the deceased persons, merely on the basis of the recovery of the axe, the

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accused cannot be connected with the murder of Balmukund, Phulbaso Bai & Ratan.

Therefore, in view of the foregoing discussion, we are of the considered opinion that there is no legal clinching circumstantial evidence through which an inference of guilt of the accused connecting him with the murder of Balmukund, Phulbaso Bai & Ratan can be drawn.

In view of the foregoing discussion, the judgments of conviction and orders of sentence passed by the trial Court in all the three sessions trials mentioned in the second paragraph of this judgment cannot be sustained, as the conviction is not based on any legal clinching circumstantial evidence connecting the accused with the murder of Balmukund, Phulbaso Bai & Ratan.

In the result, Criminal Appeals No.1626/1994, 710/2005 & 729/2005 succeed and the same are allowed. The judgments of conviction and sentences imposed upon the accused/appellant in all the three sessions trials are set aside. The accused should be set at liberty forthwith, if not required in any other case.

Sd/-
Dhirendra Mishra
Judge

Sd/-
L.C. Bhadoo
Judge

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